BOOK REVIEWS

COMMENTARIES ON EQUITY JURISPRUDENCE. By Joseph Story, LL.D. Fourteenth Edition. By W. H. Lyon, Jr., LL.B. In Three Volumes. Boston: Little Brown and Co., 1918; pp. cxcii, 545; vii, 683; vii, 682.

Judge Story's work appeared at a critical period in American legal history. The bitterness toward England which lingered after the Revolution, intensified by the unhappy war of 1812, was no doubt responsible for the hostility toward and suspicion of that peculiarly English institution, the common law. Evidence is not wanting that our courts were drifting away from the common law doctrines and becoming more responsive to the appeals of civil law. There was thus furnished a condition favorable to the reception of Roman law through some French form such as the Code Napoléon. English equity, in particular, stood in a precarious position. Not alone did it suffer like the common law (in a narrow sense) from suspicion of Britain, but it encountered the prejudices of the Puritan and the Quaker. That compulsion of the person which has been its most striking characteristic, suited ill those who asserted the unfettered freedom of the individual will, while William Penn's collision with the court of chancery (*Penn* v. *Lord Baltimore,* 1 Ves. Sr. 444) accentuated the opposition of his followers. In view of these antagonistic influences it is not a little surprising that American courts should have adopted the fundamental principles of English equity. That they did so is due in large measure to the influence of Story's Commentaries on Equity Jurisprudence* which first appeared in 1836. Story catered to the popular enthusiasm for Roman law by copious references to the civilians; yet in fundamentals, equity as he pictured it, is English equity as it took shape in the court of chancery under Lord Eldon. Today one may think that Story overemphasized the influence of Roman law; one may feel that his treatment is too scholastic and therefore unsuited to present conditions. But whatever view one may take of the intrinsic value of Story's work, one cannot forget the tremendous influence which it exercised in America. This influence is now become largely indirect; it is exerted through the older cases, which relied upon Story, rather than through the treatise itself. But as equity has not remained static, his exposition, however valuable for the lawyers and courts of the early nineteenth century, requires complete recasting if it is truly to represent the equity of today.

Any text which has become a classic presents very real difficulties to an editor. There seem to be two alternatives. He may regard the text as sacred from invasion and seek merely to explain and qualify in the notes. There is indeed an opportunity for a critical edition of Story's equity, and the profession would welcome something akin to Hammond's fine edition of Blackstone. On the other hand the editor might attempt to revise the work so as

* Cf. Pound, The Place of Judge Story in The Making of American Law, Proceedings of the Cambridge Historical Society, VII, 33.

to make it speak for the present. Under a skilful hand the result may be very effective, as in Williams on Real Property. It involves, however, the making of a new treatise, and in the case of Story there may be grave question whether such procedure would be well advised. Mr. Lyon, the editor of this last edition, has adopted neither alternative, but has sought to follow a *via media*.

What will first strike the reader is the seemingly unnecessary increase in bulk and certain annoying mechanical changes. The propensity of each successive edition to outstrip its predecessor scarcely prepares one for a third volume. This is more easily tolerable than the change in section numbers. Due to additions interspersed throughout the text the number of sections has been increased from 1587 to 2054. In consequence no reference to any previous edition of Story fits the present edition. This in itself renders the edition almost useless; no reason for the change is apparent. Another innovation of doubtful value is the introduction of black-letter head-notes to sections. It is always difficult accurately to represent the gist of an involved statement in a phrase; hence the inaccuracy of such head-notes is to be expected. But the editor has added blunders that are hard to pardon, as where he mistranslates a Latin maxim (§68) when Story has himself given a correct rendering in the same passage, or where he fails utterly to grasp the significance of the argument, (§§ 1612-1615). Of the notes little need be said, as the editor's own contributions are slight, but the failure to indicate any distinction between the original notes of Story and subsequent additions of editors is unscholarly and annoying. As many of the notes are taken from Mr. Bigelow's thirteenth edition, an acknowledgment of indebtedness would not be out of place.

The additions to the text are of questionable value. Although the editor states in his preface that "to attempt to improve upon the original utterances and writings (*sic*) of Judge Story would be futile," he fails to observe his own precept. He has not hesitated to interject into the midst of a sentence of his author a disjointed enumeration of instances which breaks its continuity (e. g. § 29); he ventures to interpolate sections which only serve to destroy the connection of the original (e. g. § 3, §§ 71-76, §§ 82-102, etc.). One or two instances of the editor's performance will suffice. Section 91 is entitled: "To What Extent Courts of One State May Enforce Conveyance of Lands in Another State." It proceeds: "This proposition involves an intricate question which has been before the courts frequently, and the weight of authority, announced by the most respectable courts, seems to be that if in an action to enforce the alleged rights the defendant is within the jurisdiction of the court and personal service is had on him, then the court may deal with him, and any judgment that might be rendered would be enforcible under the Acts of Congress in the State in which the land lies." Passing the obvious confusion of Acts of Congress and the Constitution and the equally obvious intermixture of two propositions, one notes that no case from "the weight of authority announced by the most respectable courts," is cited. The only case cited which is in point is *Fall* v. *Fall*, 75 Neb. 120 (the editor's reference is to p. 104; this is the decision on the first hearing which was later reversed), which contradicts his main proposition. Curiously enough no reference is made to the fact that this same case was carried to the Supreme Court (*Fall* v. *Eastin*, 215 U.

S. 1). The editor passes at once to the related question of divorce and alimony, and ends by betraying his head-note. One further instance: In dealing with the difficult subject of mistake the editor begins (§156): "A mistake is some unintentional act or omission or error arising from ignorance, surprise, imposition or misplaced confidence." Comment is superfluous. Nowhere does the editor exhibit power of analysis, nor grasp of the theory of equity. His efforts to generalize are characteristically represented by the definition of mistake already quoted, and the following: "The ingenuity of man in devising new forms of wrong cannot outstrip its (equity's) development," (§4; repeated §63). Yet he justifies *Robertson* v. *Rochester Folding Box Co.*, 171 N. Y. 538 (§1296). Perhaps a greater familiarity with New York statutes and decisions might have modified this opinion. (Cf. *Binns* v. *Vitagraph Co.*, 210 N. Y. 51.)

In no respect is Mr. Lyons' edition an improvement upon its predecessor (the thirteenth edition, by M. M. Bigelow); most readers will find it of less value. There is no apparent reason for its appearance.

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THE RECKONING. A Discussion of the Moral Aspects of the Peace Problem, And of Retributive Justice as an Indispensable Element. By James M. Beck, Author of "The Evidence in the Case," "The War and Humanity," Membre correspondant à l' Etranger de la Société des Gens de Lettre de France. G. P. Putnam's Sons, New York and London: The Knickerbocker Press, 1918; pp. xxx, 225.

This is the third volume by the author on important legal and ethical problems arising out of the War. Preceding volumes of the series have already been considered in 17 MICHIGAN LAW REVIEW 100. This volume shows the same legal acumen combined with elevated moral ideals of its lawyer-publicist author that were noted in its predecessors in the series. The central theme of the book is found in the second chapter in which the author calls for "justice *through reparation* to men of goodwill and justice *by punishment* to men of ill will." It is interesting to the philosophic lawyer to note that the author with his sure feeling for eternal justice here brushes aside all the maudlin sentimentality of modern penologists with their talk of reformative punishment, inflicted for the benefit of the criminal, or the ofttimes futile deterrent or preventive punishment and goes instinctively to the basic principle laid down by Aristotle that justice is equality, and, when the balance is disturbed by wrong doing, it can be reestablished only by taking the property of the offender and handing it over to his victim or, when pain has been caused, by inflicting an equivalent amount of pain upon the culprit. The author would apply this good old doctrine, crystallized by our forefathers in the maxim "an eye for an eye and a tooth for a tooth," to the present situation. We are now dealing with the greatest burglar of modern times, says the author. "We must destroy his kit of burglar tools, the Prussian military machine, * * * compel him to make restitution of his stolen property * * * and restore ravaged territories to their original condition," but above all else as a